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In The
Supreme Court of the United States
October Term, 1983

—○—
THE HEIL COMPANY,

Petitioner,

vs.

JESSIE W. MELLER,

Respondent.

—○—
**RESPONDENT'S OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT**

—○—
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April 28, 1984

QUESTION PRESENTED

Whether evidence of subsequent remedial measures implemented by a defendant manufacturer in a products liability case alleging strict liability is admissible under Federal Rule of Evidence 407 where the defendant contests the feasibility of such precautionary measures during discovery unless the defendant unequivocally admits by formal stipulation that such precautionary measures were feasible at the time of manufacture even though the issue of feasibility of precautionary measures was not ultimately contested at trial by the defendant.

TABLE OF CONTENTS

	Pages
Question Presented	i
Opinion Below	1
Statement of the Case	2
Reasons for Denying the Writ	4
Conclusion	9

TABLE OF AUTHORITIES

CASES:

<i>Herndon v. Seven-Bar Flying Service, Inc.</i> , 716 F.2d 1332 (10th Cir. 1983)	8
<i>Rimkus v. Northwest Colorado Ski Corp.</i> , 706 F.2d 1060 (10th Cir. 1983)	6
<i>Unterburger v. Snow Co., Inc.</i> , 630 F.2d 599 (8th Cir. 1980)	6

MISCELLANEOUS:

Fed. R. Evid. 407	<i>passim</i>
2 <i>Weinstein's Evidence</i> § 407-3 (1982) citing Fed. R. Evid. 407, Advisory Committee's Note	7

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit has been attached, as Appendix A, to the Petition for Writ of Certiorari filed by the Petitioner in the instant case.

STATEMENT OF THE CASE

The Petitioner is the manufacturer of a component part package assembly for a dump truck. The assembly includes the dump bed, hydraulic hoist system, and all component parts for forming an appropriate truck chassis into a dump truck. Petitioner's design includes a "trip cable" which is a wire cable running from the hydraulic control valve at the base of the hydraulic cylinder, to the rear of the truck where it is attached to the bottom end of the dump bed. The purpose of the "trip cable" is to prevent overextension of the hydraulic cylinder. Petitioner's design included a piece of metal tubing through which a portion of the middle part of the "trip cable" passed to protect it from contact. At either end of the metal shroud portions of the "trip cable" were left exposed to contact.

On May 21, 1979, Jean Meller was killed in an accident in Pitkin County, Colorado. Mr. Meller was employed by the Grande Corporation as a dump truck driver. Included in his duties was the performance of routine maintenance on the truck he was driving. On the date of the accident, Mr. Meller was attempting to lubricate the rear drive shaft of the truck. The zerk fitting for this lubrication is located on the drive shaft between the dual wheels at the rear of the truck. To reach the zerk, Mr. Meller had the dump bed in a fully upright position. Standing between the dual wheels, Mr. Meller placed himself between the chassis of the truck and the raised bed, reaching over and down to obtain access to the greasing point. While making this attempt, Mr. Meller inadvertently came in contact with the "trip cable" which

switched the control valve to the lower position. This caused the bed to rapidly descend, trapping Mr. Meller between the chassis and the dump bed. No one witnessed the accident, but Mr. Meller was ultimately found dead in this trapped position.

As a result of Mr. Meller's death, Mrs. Meller filed suit against the Petitioner alleging, among other things, that the Petitioner was strictly liable in tort in that the design of the dump bed assembly was unreasonably dangerous, and that Petitioner failed to properly warn users of the product of these dangers. These allegations were specifically denied by the Petitioner in its Answer.

Extensive discovery was then undertaken by both sides including the submission of a report and deposition of Petitioner's expert. Throughout discovery, Petitioner claimed that its product essentially conformed to the state of the art and that the product was, therefore, not dangerous. This position inherently includes the proposition that a safer design or better warning was not feasible at the time the Petitioner manufactured its product.

Since Petitioner knew the testimony Respondent proposed to adduce at trial, Petitioner filed a Motion in Limine requesting the trial court to exclude any subsequent remedial measures taken by the Petitioner either in its design, or in its warnings. Considering Rule 407 of the Federal Rules of Evidence, the trial court ruled that evidence of subsequent remedial measures could be introduced by the Respondent to show the feasibility of precautionary measures, and that a limiting instruction would be given to the jury. Aware of this ruling, at no time did the Petitioner, in any manner, admit that precautionary

measures were feasible at the time of the manufacture of the product. Indeed, Petitioner not only maintained its denial of liability; Respondent's witnesses were vigorously cross-examined concerning the feasibility of precautionary measures at the time of manufacture, and Petitioner's expert was still endorsed as an expected witness at trial.

After judgment was entered in the trial court, Petitioner appealed to the United States Court of Appeals for the Tenth Circuit alleging as error, for the first time, that the feasibility of precautionary measures at the time of manufacture were not controverted. This was never brought up in the trial court. This contention was seemingly based on their tactical decision at trial not to present any evidence to rebut that adduced by Respondent as to the feasibility of precautionary measures. The Court of Appeals held that this position was not well taken, noting that Respondent bore the burden of proving the product was "unreasonably dangerous," and Respondent was therefore obligated to prove this element of her case [Petitioner's Appendix, A-6, fn. 7]. With the limiting instruction given by the court, Respondent did nothing more than meet her burden of proof as required. This burden was met in strict compliance with Fed. R. Evid. 407. The prejudice, if any, to the Petitioner came from the Petitioner's decision not to present any evidence to rebut the evidence of the Respondent.

REASONS FOR DENYING THE WRIT

Petitioner seeks a writ from this court because of a tactical decision it made at trial in this particular case, not because of any alleged conflicts with the decisions of

the Courts of Appeals to the proper interpretation and application of Fed. R. Evid. 407 which requires a decision by this court. As can be seen from Petitioner's opening paragraph under its "Reasons for Granting the Writ," Petitioner's primary focus is directed toward the admission of subsequent remedial measures because Petitioner chose not to present any evidence at trial concerning the feasibility of such measures.

As an evidentiary exclusionary rule, Rule 407 is an exception to the general rule that relevant evidence meeting other requisites of the Federal Rules of Civil Procedure is admissible. Thus, it should be construed as written [Petitioner's Appendix, A-8, fn. 8].

Rule 407 consists of two sentences. Each is very clear and deals with different situations. The first sentence reads:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence of culpable conduct in connection with the event. . . .

It is clear that evidence of subsequent remedial measures introduced only for the purpose of proving negligence or culpable conduct is not admissible. The second sentence reads:

. . . This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The second sentence does not provide exceptions to the first sentence. It simply supplies, by way of example, when evidence of subsequent remedial measures is ad-

missible. Thus, even when the Petitioner's negligence is an issue, evidence of subsequent remedial measures can still be introduced for other purposes. When this evidence is introduced in such a case, a limiting instruction, however, should be given. *Unterburger v. Snow Co., Inc.*, 630 F.2d 599 (8th Cir. 1980). Even where negligence on the part of the defendant is not alleged, as in this case, a precautionary instruction is helpful to avoid any inference of negligence on the part of the defendant to the jury. Such an instruction was given by the trial court in this case where it stated to the jury that the design changes: "are not to be considered as an admission that earlier design was defective in any way, but simply that there is possibly an alternative feasible design, another way to do it, in other words." [Petitioner's Appendix, A-4]. It was, therefore, clear to the jury the purpose for which the evidence was being introduced thereby nullifying any tendency that the jury could treat the evidence as an acknowledgment on the part of the defendant that there was an unreasonable hazard present. *Rimkus v. Northwest Colorado Ski Corp.*, 706 F.2d 1060 (10th Cir. 1983).

Seeing that the evidence of subsequent remedial measures was admitted for a very specific purpose, that must now be analyzed in light of Petitioner's contention that the feasibility of the measures must also be "controverted." Petitioner, as a products manufacturer, would have all plaintiffs alleging that a product as designed was dangerous, and choosing to go to trial, try their case in the dark. Their reading of Rule 407 is an attempt to severely increase the plaintiff's burden of proof in a products liability action by allowing the defendant to exhibit all of the

plumage of contesting feasibility of subsequent precautionary measures prior to trial and then molting after the plaintiff's case. This would put the plaintiff in the precarious position of being: "You're damned if you do, you're damned if you don't." If the plaintiff in his case in chief chose not to put on evidence of subsequent remedial measures, this would leave the manufacturer/defendant free to contest feasibility in his case in chief. Of course, the plaintiff could then put on rebuttal evidence, but then the evidence comes across more as a defense to what the defendant has adduced, thereby losing the impact of what the plaintiff is attempting to prove.

Conversely, if plaintiff were to put on evidence of subsequent remedial measures, even with a limiting instruction, manufacturer/defendants could always decide not to put on any evidence "contesting" feasibility thereby allowing them a substantial likelihood of a reversal should the verdict be adverse to them.

Such an approach completely ignores the basic concept that plaintiff bears the burden of proving the product is unreasonably dangerous, and that the feasibility of alternative designs is an essential factor to her theory of the case [Petitioner's Appendix, A-6, fn. 7]. "The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the ground work for exclusion *by making an admission.*" (Emphasis added.) 2 *Weinstein's Evidence* § 407-3 (1982), citing Fed. R. Evid. 407, Advisory Committee's Note. In other words, Petitioner could have easily avoided what it now claims to be prejudicial evidence, by simply informing the Respondent

and the court that it did not contest the feasibility of subsequent remedial measures. This, however, it failed to do, apparently thinking that this would provide it with grounds for appeal should the judgment be adverse.

The second thrust of Petitioner's argument is saturated with the emotional appeal that: "The salutary social policy behind the rule is to encourage manufacturers to improve the safety of their products without fear that evidence of such changes will be used against them in personal injury actions arising out of products from previous generations of the product line." (Petitioner's Brief, p. 5). "... The manufacturer is forced to choose between modifying the design of its product when safer, more advanced technology is available, and the unavoidable inference, if evidence of such changes is admissible, that the previous product was 'unsafe' merely because the modification reflects a more advanced design. . . ." (Petitioner's Brief, p. 6). Although pleasing to emotions and logic, Petitioner's argument completely ignores the basic premise of products liability. That is, if a manufacturer places a dangerous product on the market when, at the time, safer designs were feasible, then it should be held liable for damages caused by the dangerous product.

Employing Rule 407 to exclude evidence of the product's safety that is relevant, and not prejudicial, as determined under Rules 401 and 403, would thwart the policies that underlie strict liability by an illogical imposition of a negligence based rule of evidence. *Herndon v. Seven-Bar Flying Service, Inc.*, 716 F.2d 1332 (10th Cir. 1983).

The ruling of the United States Court of Appeals for the Tenth Circuit is only dispositive of the applicability of Rule 407 in this case. It cannot be defined as a decision

in conflict with other Courts of Appeals. Respondent has no idea what the posture of proceedings were in other cases prior to trial, but submits that the posture of each case, as trial commences, is dispositive of the application of Rule 407. The issue thus presented to this court based on a peculiar set of facts does not warrant the intervention of this court in such an insignificant matter. Nor does the alleged conflict between the Courts of Appeals require intervention since the decisions are essentially limited to the facts of each particular case, no discernable conflict really exists.

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CONCLUSION

Based upon the arguments contained herein, Respondent respectfully requests that the Petitioner's Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals be denied.

Respectfully submitted,

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